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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN JOINT PROTECTIVE BOARD,
BROTHERHOOD RAILWAY CARMEN DIVISION,
TRANSPORTATION COMMUNICATIONS UNION,

Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY
and BURLINGTON NORTHERN, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

C. MARSHALL FRIEDMAN
KENNETH E. RUDD
NEWTON G. MCCOY
C. MARSHALL FRIEDMAN, P.C.
Thirteenth Floor
1010 Market Street
St. Louis, Missouri 63101
(314) 621-8400

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

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PETITIONER'S REPLY BRIEF

Contrary to Respondents' assertions in their Brief in Opposition, the issues presented to this Court do not concern a dispute over employee protective conditions established by the ICC. Rather, the issues presented to this Court concern whether or not Respondents violated 45 U.S.C. §152, First and Second when Respondents refused to provide information requested by Petitioner-Union (hereinafter "Union") relating to a labor dispute that arose when Repondents furloughed 67 carmen on December 30, 1985.

In Count III of the Union's Complaint, the Union alleged that a labor dispute arose because Respondents had furloughed 67 carmen effective December 30, 1985. (Complaint, Count III, ¶10) In response to this allegation, Respondents judicially admitted that:

> "10. Defendants admit that a labor dispute exists as a result of the furloughing of sixty-seven carmen on December 30, 1985, **but state that it is a "minor" dispute under the RLA because the Frisco Schedule Agreement applies.**"

(Answer, Count III, ¶10, emphasis supplied) Moreover, as the Eighth Circuit Court of Appeals in this case noted:

> "BN has maintained from the outset that the relevant closure and transfer of work were operational changes which could be instituted after ninety days notice in accordance with the Mediation Agreement, a collectively bargained agreement under the Railway Labor Act, 45 U.S.C. §151, et seq."

Burlington Northern Joint Protective Board, etc. v. Burlington Northern Railroad Company, 822 F.2d 810, 811 (8th Cir. 1987). Respondents, therefore, have contended that the underlying dispute concerning the furlough of the 67 carmen was governed by the RLA and RLA agreements (e.g., a "minor" dispute) from the inception of this litigation. Respondents also successfully convinced an ICC arbitrator that the New York Dock Conditions were not implicated by Respondents' closure of the Springfield, Missouri repair facility and transfer of work and employees to Lincoln, Nebraska. Rather, Respondents successfully convinced the arbitrator that the labor dispute was **governed by an RLA agreement.** Respondents — having successfully advanced their position that the ICC employee protective conditions of New York Dock were not applicable — should now be precluded from asserting in Response to the Petition for the Writ that the New York Dock Conditions are applicable and that the Federal Courts therefore lack subject matter jurisdiction over this Railway Labor Act dispute.

Apart from the foregoing, the characterization of the underlying dispute is insignificant in the context of the instant Petition because Petitioner's contention in this Court is that

Respondents are violating the statutory provisions of the Railway Labor Act. *See, Railway Labor Executives Association v. Boston & Maine Corp.*, 808 F.2d 150, 158 (1st Cir. 1986), *cert. den.* ____ U.S. ____, 108 S.Ct. 102 (1987). The Union contends that its right to receive requested information arises exclusively from Respondents' statutory duty — established by 45 U.S.C. §152, First of the RLA — "to exert every reasonable effort . . . to settle *all disputes,* whether arising out of the application of such agreements *or otherwise*" and the Union's statutory duty of fair representation to its members. This Court has unequivocally held that interpretation and enforcement of the statutory duties imposed by 45 U.S.C. §152, First are exclusively a matter of federal court jurisdiction. *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570, 91 S.Ct. 1731 (1971). Similarly, interpretation of and enforcement of the Union's implied statutory duty of fair representation has also been uniquely within the jurisdiction of the federal courts for over 40 years. *See, Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944). Consequently, the Union's contention that is is entitled to receive requested information by reason of 45 U.S.C. 152, First, like the Union's statutory duty of fair representation to its members, is an issue within the exclusive jurisdiction of the Federal Courts, not the ICC, because it arises exclusively by reason of the statutory mandates of the RLA. Furthermore, a determination that Respondents breached their 45 U.S.C. §152, First duties by refusing to disclose requested information to the Union can only be made by the Courts. Respondents' contentions concerning ICC jurisdiction are, therefore, completely beside the point.

Respondents baldly assert that "[t]his is not a case of refusal to provide information." (Brief in Opposition, p. 10) Respondents' refusal to provide requested information is precisely what is at issue in this Petition. The Union has previously summarized the information it requested but which Respondents refused to provide. (See, Petition for Writ, p. 6) Respondents

continue to refuse to provide the requested information even though the Union requested it nearly two years ago and Respondents admit the dispute concerning the 79 furloughed carmen is extant and ongoing. (See, Brief in Opposition, p. 14)

In Respondents' Brief, (pp. 2, 10), it is implied that the district court held evidentiary hearings on the allegations raised in Count III that Respondents had violated 45 U.S.C. §152, First by refusing to provide to the Union the information which the Union had requested. Such implications are false. The evidentiary hearing conducted by the district court was confined to the Union's request for preliminary injunctive relief in Counts I and II. (See, "Order," in Appendix at A-2 of the Union's Petition for Writ of Certiorari.) The district court dismissed the allegations of Count III — that Respondents had violated 45 U.S.C. §152, First by refusing to disclose the requested information — without conducting any evidentiary hearing thereon.

Respondents also raise the "straw man" argument that the Union contended the discovery rules of the Federal Rules of Civil Procedure (Rules 26-37 FRCP) were to be invoked. This is an utter distortion of the Union's position and belied by the record. The prayer to Count III of the Union's Complaint stated:

> "WHERFORE, plaintiff prays this Court enter an order compelling defendant BN to furnish all of the information previously requested by plaintiff Joint Protective Board and continue to furnish information relevant to the disputes concerning the furloughed employees previously mentioned."

Similarly in Count IV the Union sought a declaration of its continuing right to receive and defendant's continuing duty to provide information pertaining to the labor disputes between Petitioner and Respondents pursuant to the *statutory* rights and obligations imposed by 45 U.S.C. §152, First and Second of the

RLA. The Union's Complaint, therefore, sought *only* permanent injunctive and declaratory relief enforcing these provisions of the RLA. Nowhere in its Complaint did the Union attempt to invoke or even mention Rules 26-37 FRCP.[1]

Respondents also assert that there was no bargaining process over any collective bargaining agreement (Respondents' Brief, p. 11) and that the Union's potential liability for breach of its

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[1] Respondents egregiously misstate the holding of *Brotherhood Railway Carmen v. Pacific Fruit Express,* 651 F.2d 651 (9th Cir. 1981), see Respondents' Brief In Opposition at 12-13. Contrary to Respondents' statement, that decision had nothing to do with requests for information for use in arbitration in a minor dispute. To the contrary, the union in that case sought to establish that the dispute was a "major" dispute under the Railway Labor Act, subject to mediation procedures which, if unsuccessful, would ultimately leave the parties free to resort to self help. The union strenuously resisted any suggestion that the dispute was a "minor" dispute subject to arbitration. The union argued on appeal that the district court erred in resolving the merits of the major vs. minor dispute issue by dismissing the action after a hearing on a preliminary injunction without first advising the parties that the preliminary injunction hearing would be consolidated with trial on the merits. See FRCP 58(a)(2). The union argued that this action deprived it of the opportunity to conduct planned discovery on the major vs. minor dispute issue. The court simply held that the failure to give notice under Rule 58(a)(2) was not reversible error because, upon the record in that case, the "major-minor" dispute issue was one of law, which was therefore properly resolved by the District Court without additional discovery. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 354 n.17 (1978) is also entirely dissimilar to the instant case. It did not involve the assertion of a *statutory* right to receive information, such as that asserted by petitioners under the Railway Labor Act. The union does not assert some generalized demand for discovery — it asserts a *statutory* right to obtain particular information required by it to fulfill its statutory role as exclusive collective bargaining agent under the Railway Labor Act. The issue raised here is thus one of statutory construction in the narrow area of federal labor law — and *not* one of the general availability of the discovery provisions of the Federal Rules to arbitration matters as a broad class of cases.

duty of fair representation is absolute speculation. (Respondents' Brief, p. 15) These contentions are at best distortions. Respondents' Brief in Opposition discloses that there were ongoing conferences between labor and management concerning the closure of the Springfield, Missouri repair facility and transfer of work from Springfield to Lincoln, Nebraska. These conferences are mandatory under 45 U.S.C. §152, Second and certainly constitute negotiations. Indeed, during these conferences Respondents through their labor relations director had submitted a proposed agreement to the Union's general chairman which, if signed, would have effectively sanctioned and approved the closure of this facility and transfer of work and positions from Springfield to Lincoln. Although in the jargon of the railroad industry such an agreement is usually referred to as an "implementing agreement" rather than a "collective bargaining agreement", the difference is semantic only. Most importantly, entry into said implementing agreement would have constituted Union approval of the closure of the Springfield repair facility effectively eliminating any possibility that the 67 carmen furloughed on December 30, 1985 or the 12 additional carmen furloughed on May 2, 1986 would ever be recalled to work. Had the Union signed the proposed implementing agreement the rights of its 79 furloughed members to return to work would have been effectively terminated. The proposed agreement would have also waived other contractual benefits to which the membership may have been entitled. Moreover, had the Union signed that proposed agreement without having the benefit of disclosure of the information it had previously requested Respondents to provide, the Union certainly would have exposed itself to a potential claim by disgruntled members that the Union had breached its duty of fair representation.

It is most respectfully urged that the issues raised in this Petition for a Writ of Certiorari are of immense significance to labor relations in the railroad industry. The Union of course owes its membership and in particular the 79 furloughed

members a duty of fair representation. Certainly this duty requires more of the Union than to accept at face value Respondents' self-serving and unsubstantiated assertions that all 79 carmen were not furloughed in anticipation of the shop closure, were furloughed only as a result of a decline in business and are, therefore, not entitled to any protective benefits. However, if the Eighth Circuit Court of Appeals' opinion in this case is allowed to stand, the Union will have no practical alternative to accepting Respondents' self-serving assertions at face value. Such a result completely undermines the Union's capacity to represent its members, to police agreements, and to utilize the minor dispute procedures of the RLA and will also ultimately lead to a further increase in the hybrid breach of contract/fair representation litigation arising from complex minor disputes such as the instant one.[2] All of these results are contrary to the policies of the Railway Labor Act.

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[2] Accordingly the union will also file a petition for writ of certiorari seeking review of the Ninth Circuit opinion and judgment in *Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board v. Union Pacific,* 826 F.2d 920 (9th Cir. 1987), relied upon by respondent in this case. Respondents' Brief in Opposition at 12-14.

CONCLUSION

Accordingly, petitioner respectfully submits that this Court should grant certiorari in this case because the opinion of the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, that is the question of whether an enforceable duty to furnish relevant information exists under Section 2, First of the Railway Labor Act. This question has also been decided by the Court of Appeals in a way which conflicts with prior decisions of this Court, including notably *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570, 91 S.Ct. 1731 (1971); *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 76 S.Ct. 753 (1956); and *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 87 S.Ct. 565 (1967). See Rule 17.1(c) of the Rules of the United States Supreme Court. For these reasons, it is most respectfully urged that the Court grant petitioner a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

C. Marshall Friedman
Kenneth E. Rudd
Newton G. McCoy
C. Marshall Friedman, P.C.
Thirteenth Floor
1010 Market Street
St. Louis, Missouri 63101
(314) 621-8400

Attorneys for Petitioner